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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/688,999	10/21/2003	Gregory Plos	06028.0030-00000	4371

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EXAMINER	
ELHILO, EISA B	

ART UNIT	PAPER NUMBER
1751	

DATE MAILED: 09/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/688,999	PLOS ET AL.	
	Examiner	Art Unit	
	Eisa B. Elhilo	1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *21 August 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-41* is/are pending in the application.

4a) Of the above claim(s) *16-23* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-15 and 24-41* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *8/21/2006*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

1 This action is responsive to the amendment filed on August 21, 2006.

2 Claims 1-4, 6,11,13,24,26-37 and 39-40 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US 5,931,973) in view of Chassot et al. (US 6,231,622 B1), for the reasons set forth in the previous office action mailed on April 21, 2006.

3 Claims 5,7-10 and 12 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US 5,931,973) in view of Chassot et al. (US 6,231,622 B1) and further in view of Chan et al. (US 5,474,578), for the reasons set forth in the previous office action mailed on April 21, 2006.

4 Claims 14 and 15 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US 5,931,973) in view of Chassot et al. (US 6,231,622 B1) and further in view of Said et al. (US 2004/0143910 A1), for the reasons set forth in the previous office action mailed on April 21, 2006.

5 Claims 34-36, 38 and 41 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Kunz et al. (US 6,171,347 B1), for the reasons set forth in the previous office action mailed on April 21, 2006.

Response to Applicant's Arguments

6 Applicant's arguments filed 8/21/2006 have been fully considered but they are not persuasive.

With respect to the rejection of claims 1-4, 6, 11, 13, 24, 26-37 and 39-40 under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US' 973) in view of Chassot et al. (US' 622 B1), Applicant argues that Male and Chassot do not teach or suggests all of the limitations of

the instant claims particularly parameters L^* and C^* of the resulting coloration when the composition is applied to natural hair containing 90% white hairs, at a temperature of 27^O C ± 5^O C for a period of 4 minutes for a bath of 10 as claimed. Applicant also argues that Malle et al. (US' 973) directed to a dye composition comprising a diimino-pyraxolline dye, which does not fall within the scope of the present claims. Applicant further argues that there is no teaching or suggestion in Malle to choose a leave-in time of less than 5 minutes. Furthermore, applicant argues that Chassot is directed to a dye composition comprising a direct dye (indane derivative) which does not fall within the scope of the present claims and wherein triarylmethane dyes as an additional dyes that may be selected from a laundry list of dyes in order to obtain other color shades and Chassot disclosure also silent with respect to the parameters L^* and C^* of the resulting coloration when the composition is applied to natural hair contains 90% white hairs, at a temperature of 27^O C ± 5^O C for a period of 4 minutes for a bath of 10 as claimed.

The examiner respectfully disagrees with the above arguments because the use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain. "*In re Heck*, 699 F.2d 1331, 1332-33 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re lemelson*, 397 F.2d 1006, 1009, 158 USPQ 275, 277 (CCPA 1968)). Further, a reference may be relied upon for all that it would have reasonably suggested to one having ordinary skill in the art, including non-preferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, 10 USPQ2d 1843 (Fed.Cir.), *cert. denied*, 493 U.S. 975 (1989). Furthermore, the open languadge of the claims "comprising" allowed a person of ordinary skill in the art to add more dyeing ingredients in the dyeing composition. In this case Malle et al. (US'

973) as a primary reference clearly teaches the claimed species of the direct dyes triaminotriphenylenymethane (arylmethane) dyes of Basic violet 1 (triaminotriphenylmethane of a formula (I) and Basic blue 26 (triaminophthyldiphenylmethane of a formula (III) as the preferred dyes (see col. 15, lines 60-65) and wherein the living time ranging from 3 to 60 minutes which covers the claimed limitation (see col. 26, claim 22). Chassot et al. (US' 622 B1) as a secondary reference clearly teaches a pocess for dyeing hair comprising applying to the hair a dyeing composition at a temperature of 20 to 50 ^{O}C which whithin the claimed ranges (see col. 13, claim 11). Therefore, there is clear suggestion and sufficient motivation to one having ordinary skill in the art to be motivated to utilze such a process for dyeing hair and would expect such a composition to be applied to the human hair at least at a room temperature and would expect such a method to have similar properties and similar results to those claimed in the absent of contrary.

Further, Applicant has not shown on recod that the claimed dyeing composition demostrates superior and unexpected results when applied to the hair over the dyeing composition of the closest prior art of record.

With respect to the rejection of claims 5,7-10 and 12 under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US' 973) in view of Chassot et al. (US' 622 B1) and further in view of Chan et al. (US' 578), Applicant argues that there is no motivation for the skilled artisan to select the specific dye of Chan for use with the diimino-pyrazole dyeing composition of Malle and also Chan does not disclose a leave-in time of less than five minutes as claimed.

The examiner respectfully disagrees with the above arguments for the same reasons mentioned above. Futher, Chan et al. (US' 578) teaches clearly that the treatment time of not

more than 5 minutes is employed and preferably the treatment time is 1 to 3 minutes (see col. 12, Example 9). Therefore, there is a sufficient motivation to one having ordinary skill in the art to minimize to treating period of the application of the dyeing composition on hair in order to minimize possible hair bleaching. Therefore, the prima facie case of obviousness has been established.

With respect to the rejection of claims 14 and 15 under 35 U.S.C. 103(a) as being unpatentable over Malle et al. (US' 973) in view of Chassot et al. (US' 622 B1) and further in view of Said et al. (US' 910 A1), Applicant argues that Said does not remedy the deficiencies of Malle and Chassot and therefore, the rejection of the claims is improper.

The examiner respectfully disagrees with the above argument for the same reasons mentioned above.

With respect to the rejection of claims 34-36, 38 and 41under 35 U.S.C. 103(a) as being unpatentable over Kunz et al. (US 6,171,347 B1), Applicant argues that Kunz does not teach or suggests a leave-in time of less than 5 minutes and further does not teach or suggest process resulting in a coloration with L* value of less than 40 and/or a C* value of greater than 20 when the at least one dye composition is applied to natural hair containing 90% white hairs at a temperature of 27^{O} C $\pm$ 5^{O} C for a period of 4 minutes for a bath ratio of 10 as claimed.

The examiner respectfully disagrees with the above arguments because Kunz et al. (US' 347 B1) clearly teaches a stripping process for hair dyed with a combination of oxidative dyes and/or direct dyes as claimed and wherein the action time of the stripper depending on the color to be removed and on the temperature (see col. 10, line 64-67). Further, if range of prior art and claimed range do not overlap, obviousness may still exist if the range are close enough that one

would not expect a difference in properties, *In re Wooddruff* 16 USPQ 2d 1934 (Fed. Cir 1990); *Titanium Metals Corp. V. Banner* 227 USPQ 773 (Fed. Cir. 1985); *In re Aller 105 USPQ* 233 (CCPA). Furthermore, a prima facie case of obviousness exists where the claimed ranges and prior art ranges do not overlap but are close enough that one skilled in the art would have expected them to have the same properties, see *Titanium Metals Corp. of America v. Banner*, 778F.2d 775,227 USPQ 773 (Fed. Cir. 1985). See MPEP 2144.051. Furthermore, as the optimization of results, a patent will not be granted based upon the optimization of result effective variable when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the prima facie case of obviousness, see *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980). See also *In re Woodruff*, 919 F. 2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Therefore, a person of the ordinary skill in the art would expect such a process to have similar results to those claimed in the absent of contrary.

7 **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eisa B. Elhilo whose telephone number is (571) 272-1315. The examiner can normally be reached on M - F (8:00 -4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on (571) 272-1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Eisa Elhilo
Primary Examiner
Art Unit 1751

September 15, 2006